STATEMENT OF JEFFREY N. SHANE, ASSISTANT GENERAL COUNSEL FOR INTERNATIONAL LAW, DEPARTMENT OF TRANSPORTATION, BEFORE THE SUBCOMMITTEE ON MERCHANT MARINE AND TOURISM OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, ON THE AMENDMENTS TO THE SHIPPING ACT, 1916, PROPOSED IN S. 1460, S. 1462, AND S. 1463, SEPTEMBER 19, 1979

My name is Jeffrey N. Shane, Assistant General Counsel for International Law, Department of Transportation. I am accompanied today by Mr. Peter Schumaier of the Office of Marine Transportation, and Mr. Warren Dean of the Office of International Law. I am pleased to respond on behalf of the Secretary to the invitation of the Subcommittee to testify on S.1460, S.1462, and S.1463, bills to amend the Shipping Act of 1916 to facilitate and streamline the implementation of U.S. maritime regulatory policy.

Mr. Chairman, the improvement of ocean carrier regulation and the revitalization of the U.S. ocean shipping industry have been important concerns of this Administration. On July 20, 1979, the President sent you his maritime policy message endorsing the revision of our laws to define clearly the standards for acceptable conference practices and the limits of conference antitrust exemption, and to reemphasize our commitment to competition in ocean shipping.

Specifically, the President outlined needed changes in the Shipping Act. The Act should be amended, he said, to:

1) reestablish the primacy of the Federal Maritime Commission;
2) redefine the limits of antitrust immunity available to conferences under Section 15 of the Act;
3) shorten the timetable for FMC action; and
4) authorize antitrust exemptions for shippers councils.

These proposals are intended to simplify and shorten ocean regulatory proceedings and introduce stability and certainty into the regulatory process. They respond to many of the same concerns that prompted the introduction of the bills which we are discussing today. With the specific exception of authorizing shipper's councils, however, the actual provisions of these bills do not appear to be consistent with the recommendations outlined in the President's message.

The three bills contain a variety of measures for addressing the industry's problems. I would like to focus today on their principal features, and on the general issues that they raise. I will first address S. 1460 and S. 1463, which propose significant changes in present law as reflected in the 1916 Shipping Act.

The Department of Transportation endorses the need to redefine in a precise way our policy regarding the administration and enforcement of the Shipping Act. The broad objectives set forth in Section 2 of S. 1460 are addressed to this need. Consistency with these objectives would be made part of the criteria to be considered by the FMC in deciding whether to approve ocean carrier agreements under Section 15 of the Shipping Act.

As presently drafted, however, this provision includes the objectives of promoting and protecting the U.S.-flag fleet and of encouraging U.S. exports. While the Department of Transportation supports these goals, we do not believe that they should be included among the operating standards which govern an agency of the United States which has regulatory jurisdiction over all carriers, U.S. and foreign, operating in the

U.S. trades. Were the FMC authorized to discriminate among carriers and shippers on the basis of citizenship, possibly even against the interest of trading partner carriers in particular trades, its decisions would, as a practical matter, call for frequent government-to-government negotiation, and might well invite foreign retaliation. We would urge the deletion of these objectives as standards for agency action, in order to maintain a regulatory policy which does not discriminate among carriers or other economic interests solely on the basis of their national affiliation. Traditional economic theory would argue in favor of continuing to achieve these objectives through direct subsidies, as opposed to less efficient regulatory action.

We are also concerned about the approach that S. 1460 and S. 1463 take towards the antitrust exemption for the ocean shipping industry. We are aware that the scope of the exemption has been eroded significantly and is uncertain under present law, largely as a result of judidical and administrative interpretations of Section 15 of the Shipping Act. We are not convinced, however, that these developments require the blanket exemption for all ocean carrier agreements and conduct which the two bills would create. We do support the establishment of a presumption in favor of approval for certain specified kinds of agreements. For example, a presumption in favor of approving conference agreements which guarantee a right of independent pricing action -- such as is provided under S. 1460 -- should be explored. We would support a provision authorizing the FMC to exempt conduct necessary to implement approved agreements.

Our principal concern in this regard is with a wholesale jurisdictional exemption of all agreements from the antitrust laws without the need for case-by-case administrative approval. For example, Section 4 of S. 1460 would exempt even unfiled agreements among carriers.

Whether the FMC should be given authority to approve merger and acquisition agreements among common carriers by water subject to the Shipping Act, as proposed in S. 1460 and 1463,also is by no means clear. The FMC does not have this authority under present law, even though it has approved certain consortia agreements involving foreign carriers. S. 1460 would in fact confer jurisdiction on the FMC over acquisitions involving purely foreign carriers, thus suggesting a unilateral extension of U.S. regulatory jurisdiction that might well be unacceptable to our trading partners. S. 1463 would limit the FMC's approval authority to acquisitions or mergers which involve U.S. ocean carriers only, but the application of the Clayton Act to these mergers presently provides a satisfactory means of preventing such combinations when they appear anticompetitive. In our view, establishing a new approval procedure in the FMC is unnecessary.

It might be more advisable to consider whether only those agreements for which antitrust immunity is sought should require prior approval by the FMC. Conference antitrust counsel would determine which agreements should be filed for prior approval, and agreements for which no antitrust immunity is requested might become effective immediately upon filing. Since it has been held that the FMC lacks jurisdiction to

approve mergers and acquisitions under present law, this might help to clarify questions about FMC jurisdiction over joint ventures. Further, such a "permissive" approval scheme would reduce the burden of the administrative process.

S. 1460 and S. 1463 would authorize the FMC to approve agreements pertaining to intermodal services, including agreements with carriers not otherwise subject to the regulatory jurisdiction of the Shipping Act. The provision of efficient and innovative intermodal services is essential to the national transportation system, and is therefore a matter of serious concern to this Department. We are aware of the particular importance of U.S. ocean shipping policy in this regard. Since U.S. carriers appear to be most competitive in the high technology services that facilitate intermodal movements, it is imperative to provide a regulatory environment that facilitates intermodal transportation. The Railroad Deregulation Act, which the President recently transmitted to the Congress, works to this end by freeing the divisions of joint rates from regulation. In the interest of bringing similar improvements to shipping industry, we believe that the authority of the Federal Maritime Commission to approve and confer antitrust immunity on ocean carrier agreements pertaining to intermodal services should be clarified. While the FMC has approved a number of conference agreements which deal with intermodal authority, the Commission's jurisdiction to do so is unclear and has been challenged by the Justice Department.

As a matter of philosophy, DOT is considering whether the FMC should be given jurisdiction over ocean carrier agreements pertaining to intermodal services, thereby

allowing conferences to set intermodal rates. It may well be, however, that deregulating the carrier divisions of these intermodal rates would be a beneficial corollary to such authority. Although we have reached no final conclusions on these issues, it is not clear that conferences should be authorized to negotiate rate divisions with inland carriers in such circumstances. Another important question is whether dual-rate contracts should be authorized in connection with undivided intermodal through rates offered by conference carriers. If so, they should bind the shipper only as to shipments whose ocean portion moves over the trades where the conference has its authority. It may also be useful to consider limiting a conference's geographic or market authority to prevent the frustration of competition between intermodal and all-water services. We at the Department of Transportation are reviewing these issues very carefully.

Recent developments in the ocean shipping industry, in particular the rapid growth in cross trader capacity in the U.S. trades and the likely entry into force of the UNCTAD Code of Conduct for Liner Conferences, are forcing a reexamination of the traditional open conference policies of the United States. S. 1460, for example, would authorize conferences to limit admission on reasonable and equal terms to trading partner carriers. This, coupled with the authority to pool or apportion earnings, rationalize sailings or capacity, or otherwise control or prevent service competition, would amount to authorizing closed conferences in the U.S. trades. The Department of Transportation is fully cognizant

of current trends in ocean shipping. Nevertheless, we are generally opposed to such rationalization measures.

If conferences operating in the U.S. trades were allowed to limit their access to trading partner carriers, such action should only be taken in conjunction with a prohibition on all conference capacity restrictions, whether through pooling agreements or otherwise, in order to allow the free entry of the trading partner carrier capacity needed to provide the services essential to U.S. foreign commerce. Further, interconference and rate agreements should also be prohibited, and the conference system structure -- specifically, conference geographic and market authority -- should be reexamined to limit a conference's authority to a specific market. Thus, limited access conferences could not abuse their market power by limiting the amount of services offered in particular trades.

I would like to turn now to S. 1462, which differs in scope from the other two bills we are addressing today. S. 1462 would establish and implement a statutory shipping policy to encourage bilateral arrangements by authorizing reciprocal ocean transport agreements between U.S.-flag carriers and the national carriers of each nation trading with the United States. Cargo revenue pooling, rationalization of sailings and equal access agreements would be allowed. This bill would also authorize bilateral liner shipping agreements which would be entered into by the U.S. Government and foreign governments.

In his message to you of July 20, Mr. Chairman, the President affirmed this Administration's general policy of opposing cargo sharing

agreements, except where necessary to protect the competitive rights of U.S. carriers.

As we indicated in testimony before the House on April 26 of this year, the extension of a cargo sharing philosophy to U.S. ocean shipping would run counter to U.S. free trade philosophy and long-standing national transportation policies. At DOT, we are increasingly aware of the impact of our policies towards particular transport modes on the national transportation system as a whole.

We believe, therefore, that any move towards greater reliance on nonmarket forms of cargo allocation, and the inevitable rigidities and inefficiencies that would result, should be approached with the greatest caution. In fact, the Department believes the application of universal mandatory cargo sharing to the liner trades would frustrate the regulatory policy of the Shipping Act of preserving service competition in the conference system, which the President implicitly affirmed in his message of July 20.

A 1976 study by DOT's Transportation Systems Center concluded that mandatory cargo sharing would be detrimental to the efficient conduct of international trade. We are moving to update that study.

In light of these concerns, we believe that promotional incentives rather than regulatory administrative measures should be the primary means of increasing U.S.-flag participation in the foreign trades of the United States. Cargo sharing agreements should only be used where the national policies of a trading partner could operate to exclude U.S.-flag operators from a trade.

To conclude, the United States has accepted the conference system of organization for the liner trades, which rightly or wrongly is strongly supported by our major trading partners. We place considerable restrictions upon conference activities because of the potential for abuse of their services and the possibility of discrimination among shippers. But in recent years our system of balanced rights and privileges has come under much criticism, both in the United States and from our trading partners. It therefore appears timely to revise substantially the laws governing the liner conferences in order to define clearly the standards governing conference behavior and the limits of conference antitrust exemptions, while continuing our commitment to fair competition in ocean shipping and in the transportation industry in general.

I want to emphasize on behalf of my Department our continued interest in U.S. ocean shipping policy. Very nearly all ocean transportation movements are preceded and followed by a land movement and the Department of Transportation has been very active in trying to bring our land transportation regulations into harmony with the realities of the last quarter of this century. President Carter has a very deep interest in our maritime industry, as he indicated in his letter of July 20 to your Subcommittee, outlining a coherent set of maritime policies for the future. We agree with the Congress that Federal regulation of the shipping industry deserves review. Current laws and national policies require examination in light of current developments

in the world shipping industry. Equally important the Government is moving to address maritime problems in a more unified and coherent way than we have in the past. Only in this way can we have an effective policy in which the U.S.-flag industry can develop and prosper.

While we cannot support the bills as now written, the Department looks forward to working with other Executive Branch agencies and your Subcommittee in addressing the problems of ocean carrier regulation in a manner which is consistent with the President's maritime policy.

Mr. Chairman, this concludes my statement. It has been a pleasure to appear before you. We will be forwarding to your Subcommittee section-by-section analyses of the bills we have discussed today. I would be happy to answer any questions you or your Subcommittee may have.